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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 179

WALTER C. LOPTIEN and LOLA LOPTIEN,

Appellants,

vs.

CITY OF SYCAMORE,

Appellee.

On Appeal from the Supreme Court of Illinois.

APPELLEE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

INTRODUCTION

The City of Sycamore, a municipal corporation of Illinois, respectfully suggests to this Court that the appellants, Walter C. and Lola Loptien, have utterly failed to show any reason why the Supreme Court should grant certiorari in this case.

I. The facts of record show no substantial Federal question is presented. As the record shows, the appellants received a jury trial in 1959—almost nine (9) years ago—on the City of Sycamore's complaint against appellants Loptien to assess a fine and to enjoin a zoning violation. The jury verdict was rendered on June 11, 1959, on Count I of the complaint. The jury verdict assessed a judgment of fine against the defendants in the amount of $1,750.00

and found the defendants guilty of the zoning violation of building two (2) houses on one lot. The fine was paid by the appellants, Loptien, and no appeal was ever taken from that judgment. Appellants do not contest this fact.

The other count, Count II of the plaintiff, City of Sycamore's case against the defendants, was a complaint for injunction. After appellants had paid their fine a second full hearing was had on March 3, 1967, before the Honorable Carl A. Swanson, Jr., Judge of the Circuit Court of the Sixteenth Judicial Circuit in and for DeKalb County, Illinois, who rendered a judgment order on Count II enjoining the defendants from maintaining the second house constructed on the one lot and commanding them to remove the second house.

The uncontradicted affidavit of the Clerk of the Court, which was attached to the motion to dismiss the appeal in the Supreme Court of Illinois, points out:

1.) A record was in fact furnished to the appellants except for the transcript of proceedings (evidence presented) of the 1959 trial in Count I which transcript is not material to Count II and as to which no appeal was taken, and

2.) As to the transcript of proceedings, appellants never paid for the same, cancelled the order thereupon, and reordered too late to allow completion within the time required.

When the appellants appealed to the Supreme Court of the State of Illinois for this latter judgment, the City moved to dismiss that appeal, pointing out:

1.) That the appeal was not timely filed in that the final order on the appellants' post trial motion was entered on April 9, 1967; that in violation of Section 76, Chapter 110 of the Ill. Rev. Stats. (1965)

limiting the perfection of appeals to a period of thirty (30) days from the entry of the order complained of, defendants' notice of appeal was not filed until June 22, 1967.

2.) In addition, the City of Sycamore pointed out that although the Supreme Court had granted the Loptiens a thirty (30) day extension of time to file the record on appeal, they had allowed the thirty (30) days to expire, ignored the Supreme Court order, and had shown no excuse or justification for so ignoring it.

The Supreme Court of Illinois dismissed the appeal.

It is clear that appellants Loptiens' only real position here is that they were deprived of their rights under the Fourteenth Amendment because the Clerk of the Circuit Court refused to file and transmit a complete record on appeal within the time limited by Illinois Statute and that thereby their appeal was dismissed by the Supreme Court of the State of Illinois.

In view of the facts and the law, no substantial Federal question is presented by appellants' Petition and the Court in its discretion should deny appellants' Petition for Writ of Certiorari.

II

STATUTES INVOLVED

Ch. 110, Sec. 76, Ill. Rev. Stats. 1965:

§ *76. Limitation of review—Perfection of appeal.* (1) No appeal may be taken from a trial court to the Supreme or Appellate Court after the expiration of 30 days from the entry of the order, decree, judgment or other determination complained of, but notice of appeal may be filed after the expiration of the 30 days, and within a period

not to exceed 14 months from the entry of the order, decree, judgment or other determination complained of, by order of the reviewing court, entered within the 14 months, upon petition filed and notice given to adverse parties within 1 year from the entry of the order, decree, judgment or other determination, and upon a showing by affidavit that there is merit in appellant's claim for an appeal and that the failure to file notice of appeal within the 30-day period, or the failure properly to prosecute an appeal which was perfected within the 30-day period was not due to appellant's culpable negligence. The fact that appellant may have filed a notice of appeal prior to the filing of his petition for leave to appeal does not deprive the reviewing court of the power in its discretion to grant leave to appeal. The reviewing court in its order granting leave to appeal shall fix the time for the filing (within the 14-month period) of the notice of appeal which it allows.

If an appeal is perfected or allowed more than 30 days after the entry of any order, decree, judgment or other determination in any action, (or if an appeal is perfected within the 30 days and no supersedeas bond is filed and approved within 30 days from the entry of the order, decree, judgment or other determination, or within any further extended time allowed by the trial or reviewing court within the 30 days or any extensions thereof, as provided in Section 82 of this Act), the reversal or modification of the order, decree, judgment or other determination shall not affect the right, title or interest in or to any real or personal property of any person, not a party to the action, acquired after the entry of the order, decree, judgment or other determination but before the appeal operates as a supersedeas under the provisions of this Act; nor shall the reversal or modification affect any right of any person not a party to the action under or by virtue of any certificate of sale issued before the appeal operates as a supersedeas,

pursuant to a sale based on the order, decree, judgment or other determination. If the appellant was an infant or non compos mentis or under duress at the time of the entry of the order, decree, judgment or other determination, the period of disability shall be excluded from the computation of the periods of limitation, but this exclusion shall not apply to, or affect the rights acquired in the property or certificate of sale as is in this section hereinbefore set forth before the appeal operates as a supersedeas, in case the appeal is perfected or allowed more than 30 days after the entry of the order, decree, judgment or other determination.

(2) An appeal is perfected when the notice of appeal is filed in the lower court. After being perfected no appeal shall be dismissed without notice, and no step other than that by which the appeal is perfected is jurisdictional. As amended by act approved May 19, 1965. L.1965, p. ——, H.B.No. 948. Effective Jan. 1, 1966.

Ch. 110, Sec. 101.36, Ill. Rev. Stats., 1965:

101.36. (*Supreme Court Rule 36*). *The Record on Appeal.* (1) Præcipe for Record; Report of Proceedings at the Trial.

(*a*) *Praecipe practice.* In appeals taken directly to an Appellate Court or this court, the appellant shall, within 10 days after the notice of appeal has been filed, prepare and file a præcipe with the clerk of the trial court, with proof of service of a copy on the appellee or his attorney, in which appellant shall designate what parts of the trial court record are to be incorporated in the record on appeal. The appellee, or co-party prosecuting a separate appeal, shall within 5 days after being so served, file a præcipe for any additional parts of the record that he may desire to have incorporated in the record on appeal, with proof of service of a copy upon each party or attorney or firm

of attorneys who signed the notice of appeal.

(*b*) *Copies in record on appeal; Use of original report of proceedings or master's report.* All parts of the record so designated shall be incorporated in the record on appeal by copies certified by the clerk. However, the original of the report of proceedings at the trial, as certified by the trial judge, whether in the form of a complete stenographer's report or a condensed statement, or the original of the master's report shall, if requested in a præcipe, be incorporated in the record on appeal in lieu of certified copies, unless otherwise ordered by the trial court.

(*c*) *Certification and filing of report of proceedings.* The report of the proceedings at the trial, consisting of the rulings of the trial judge, the testimony, all other matters upon which rulings were made, and any other proceedings before the trial judge which the appellant desires to incorporate in the record on appeal, shall be procured by the appellant and submitted to the trial judge or his successor for his certificate of correctness, or if that is impossible because of the absence from the district, sickness or other disability of the judge, then to any other judge of the court, and filed, duly certified, in the trial court within 50 days after the notice of appeal shall have been filed.

A brief statement by the trial judge of the reasons for his decision may be included in the report of the proceedings at the trial.

On application made before the expiration of the original or extended period allowed by this rule for filing the report of proceedings, any judge of said court may on good cause shown extend the time for filing the same. The extensions of time granted in the trial court shall not exceed in the aggregate a period of 45 days from the last day fixed by this rule for filing the report of proceedings. Further extensions of time may be granted only by the reviewing court or a judge thereof in vacation in the man-

ner provided in subdivision (2) (e) of this rule, upon application made within the extended period granted by the judge of the trial court, or within any further extended period granted by the reviewing court or judge thereof.

* * * *

(*e*) *Dismissal of appeals by the trial court.* Prior to the filing of any record in the reviewing court, the trial court may dismiss the appeal upon stipulation of the parties or upon failure of the appellant to file the record on appeal in the reviewing court in proper time.

(2) Content and Filing of the Record on Appeal; Short Record.

(*a*) *Arrangement of record.* The record on appeal shall be arranged in chronological order substantially as follows: process and service, pleadings, orders, motions, affidavits, verdict in jury trials, the judgment or decree, the report of proceedings at the trial, the master's report and depositions, notice of appeal and præcipe for record, together with proof of service thereof, and appeal bond in case one has been given. No assignment of errors or cross-errors is necessary. As soon as the necessary copies or originals of all the records and documents specified in the præcipe are in possession of the clerk of the trial court, he shall immediately make up the record on appeal by attaching together all of said records and documents specified in the præcipe, and number the pages consecutively.

(*b*) *Short record.* If any action on the part of the reviewing court is sought before the record on appeal is filed, the party seeking relief shall file with his application an appropriate short record containing enough of the record on appeal to show a final order, judgment or decree, notice of appeal filed in proper time, proof of service of a copy of the notice of appeal, the præcipe for record and proof of service and any other parts of the record of the

trial court necessary to the application made.

(*c*) *Transmission of record on appeal.* The record on appeal shall be transmitted to the reviewing court, either by a party or by the clerk of the trial court, but the clerk is under no duty to deliver or transmit the record until his fees are paid.

(*d*) *Time for filing record on appeal.* The record on appeal shall be filed in the reviewing court not more than 60 days after notice of appeal has been filed. If the time for filing the report of proceedings is extended, the time within which the record on appeal must be filed is without the necessity of an order extended 10 days beyond the extended time for filing the report of proceedings.

(*e*) *Extension of time for filing record on appeal.* Further time within which to file the record on appeal may be granted by the reviewing court or any judge thereof in vacation, upon motion and affidavit showing good cause and due diligence. The motion must be accompanied by a short record and be made before the expiration of the time for filing the record on appeal or any extensions thereof.

(*f*) *Notice of filing record on appeal.* Within 5 days after the record on appeal is filed in the reviewing court, the appellant shall serve written notice of the filing date on the opposing parties and at the same time mail a copy of the notice to the clerk of the reviewing court.

(*g*) *Dismissal of appeal by reviewing court.* After a short record or a record on appeal is filed in the reviewing court, only that court may dismiss the appeal. The reviewing court shall dismiss the appeal if the record on appeal is not filed in proper time.

(3) Insufficient Record on appeal; Unnecessary Matter Included in Record on appeal.

If the record on appeal is insufficient to present fully

and fairly the questions involved, the requisite portions may be supplied at the cost of the appellant.

Any party who has specified for incorporation in the record on appeal unnecessary and immaterial portions of the trial court record may be ordered by the reviewing court, irrespective of how the appeal is decided, to bear the entire expense of incorporating those portions, as costs in the case.

(4) Insufficient Authentication of Record on appeal.

A claim that any matter in the trial court record incorporated in the record on appeal is not properly authenticated may be raised only by motion filed by the appellant or appellee before or at the time of filing his brief. The motion shall be supported by affidavit showing, not only that the matter complained of is not properly authenticated, but that it is in fact incorrect, and that injury will result to the objecting pary because of its inclusion. Unless a motion is made in the manner required by this rule, the record shall be deemed to be correct.

(5) Return of Original Papers.

Any original paper incorporated in the record on appeal shall be returned to the trial court upon the motion of either party after the cause or proceeding has been finally decided by the reviewing court.

III

ARGUMENT

No Substantial Federal Question Is Presented.

The question presented is not a substantial Federal one and no violation of the Fourteenth Amendment has been alleged.

Plainly, appellants Loptiens' whole position is based upon the fact that their long, drawn out campaign to evade

the ordinances of the City of Sycamore limiting one house to one lot has finally failed.

Appellants received a jury trial on the issue of their zoning violation and did not appeal and paid the fine.

Now, when the order for injunction, compelling them to remove the second house built in violation of the ordinance, as the jury so found, is about to be enforced, appellants seek the aid of this Court to further delay compliance with the provisions of the laws which are designed to safeguard the public health, safety and to avoid urban congestion.

Much of appellants' "Jurisdictional Statement" is, frankly, incoherent, but basically the question comes to this: Where no indigency is alleged and where, in a civil matter, an appellant has failed to comply with the provisions of a State Civil Practice Act and the Rules of the State Supreme Court limiting the time within which an appeal and a record therein may be filed, may that appellant claim that his constitutional rights under the Fourteenth Amendment have been violated when his appeal is dismissed by the State Supreme Court?

The provisions of the Illinois statutes governing the filing of appeals are set forth in full. There is no violation either in their letter or in their spirit or application to the case at bar.

A. So far as failure to file the jurisdictional notice of appeal within the time limited by Sec. 76 of the Illinois statutes appellants offer no excuse whatsoever.

B. We assume that appellants seek a Writ of Certiorari even though they entitle their printed document "Jurisdictional Statement."

Appellants' entire "Jurisdictional Statement" and motion do not even mention their failure to file the Jurisdic-

tional Notice of Appeal in the Supreme Court of Illinois within the time limited by statute.

The Supreme Court of Illinois also might well have dismissed the appeal upon this failure to file the Notice of Appeal within the required thirty (30) days as is mandatory under Supreme Court Rule 36(2)(g).

C. So far as the failure to file the Record on Appeal within the time limited is concerned, Chapter 110, § 101.36, Ill. Rev. Stats. 1965 (Supreme Court Rule 36(2)(c)) explicitly provides:

> "The Record on Appeal shall be transmitted to the reviewing court either by a party or by the Clerk of the Trial Court but the Clerk is under no duty to deliver or to transmit the Record until his fees are paid."

We remind the Court that the uncontradicted affidavit of the Clerk of the Circuit Court of DeKalb County (paragraph 2) points out that:

> "This affiant as clerk received the Præcipe for Record and *furnished to defendant* everything therein requested on October 24, 1967, except certain portions of the transcript of proceedings of the trial held June 10 and 11, 1959, which were to be designated by the defendant, but which had not been so designated to said date."

This is the Record that the appellant for some reason did not file with the Supreme Court and which he could have filed had he wished. His failure to do so is neither explained nor justified.

The only thing not in the Record as furnished is the evidence (Report of Proceedings) at the 1959 trial. This portion of the Record was immaterial to the disposition of the appeal here. Appellants had a complete record as specified in appellants' own præcipe in October, 1967.

The rule above quoted provides for the payment of the

Clerk but the Clerk was never paid.

The uncontradicted affidavit of the Clerk of the Court, Mr. Livingstone, points out that the appellants tendered a check, stopped payment on it, withdrew it, and then after withdrawing his check and cancelling his order for the transcript of proceedings, again directed the Clerk to make up the Record of the trial with only some sixteen (16) days left before the deadline.

The affidavit of the Clerk is further uncontradicted that the appellants were informed that the Clerk could not meet this requirement; yet appellants, having waited until too late to order the record, now insist that their constitutional rights were violated.

Plainly this is not the case. The appellants had the common law record since October 24, 1967. They did not file it.

The transcript of proceedings at the 1959 trial, which resulted in the judgment of violation of the zoning ordinance, and assessed the fine which appellants paid in 1959 and from which they did not appeal, were immaterial to the disposition of Count II.

It was only the verdict of the jury and the judgment entered thereon and the resulting estoppel that were important to the trial of Count II. To insist that appellants' constitutional rights were violated in these circumstances is to presume upon the common sense of this Court.

This Court has stated in a considerably graver matter—a criminal case—that a period of limitation on the right of appeal accords with the Federal Supreme Court's conception of proper procedure. *Brown* v. *Allen,* 73 S. Ct. 397, 344 U.S. 443, 97 L.Ed. 469, *rehearing denied* 73 S. Ct. 827, 345 U.S. 946, 97 L.Ed. 1370.

As stated by an Ohio court, the enforcement of limitations of a statute providing for the time and manner of

prosecution of error is not a denial of due process of law. *Luft* v. *State*, 146 N.E. 892, 112 Ohio State 102 (1925).

And a California court in *Bates* v. *Ransome-Crummey Co.*, 184 P. 39, 42 Cal. App. 699, has held that a state statute providing that if a motion for new trial is filed after the time to appeal has expired, it shall not extend the time to appeal, does not deny due process of law.

This Court has also held in *Carter* v. *People of the State of Illinois*, 67 S. Ct. 16, 329 U.S. 173, 91 L.Ed. 172, that where the only record before the Illinois Supreme Court reviewing a murder conviction was a common law record, which included the indictment, judgment of guilty pleas, the minute entry bearing on the sentence and the 99 year sentence of imprisonment, the practice of the Illinois Supreme Court in restricting the record on review to the record set forth above was an allowable state appellate procedure.

This Court also has denied certiorari in *Chessman* v. *People*, (C.A. 9, 1953), 205 F. 2d 128, certiorari denied, 74 S. Ct. 278, 346 U.S. 916, 98 L.Ed. 411, *rehearing denied*, 74 S. Ct. 430, 347 U.S. 908, 98 L.Ed. 1066, when the 9th Circuit held that there can be no denial of Federal due process in the procedure used to settle the Record on Appeal in a State prosecution.

Plainly the internal regulation of a State court's procedures by reasonable rules and time limitations in a civil matter does not give rise to a constitutional deprivation of a non-indigent litigant who has an appeal dismissed for failure to abide by those rules. There must be time limits and system to permit the orderly disposition of litigation.

CONCLUSION

The appellee, City of Sycamore, accordingly prays that the Petition for Writ of Certiorari of the appellants, Loptien, be denied.

Respectfully submitted,

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